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William Nicoson

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A.B. Princeton University, 1965; LL.B. Harvard University, 1959. Member of the District of Columbia Bar. Former director of the new community assistance program at the United States Department of Housing and Urban Development, 1970-72. The author acknowledges the assistance of the New Community Development Foundation, Inc. rendered under a grant from the Ford Foundation.

INSTITUTIONAL INNOVATION IN NEW TOWNS: THE DUAL DEVELOPER CONCEPT

*William Nicoson**

I. Introduction

New communities[1] have long been celebrated as models for increased order and quality in the process by which rural land is brought into urban use and urban land into more intensive use.[2] At the community level, innovations may be more readily tested in new communities rather than in existing settlements.[3] While much attention has been focused upon innovations in technological and social systems,[4] little attention has been given to institutional and financing innovations.[5] Nonetheless, new institutional and financing techniques have been quietly introduced in the development of new communities.

The most significant of these innovations address the problem of assuring the acquisition of capital in the improvement of land for public use. Initially, these innovations have been directed at public service facilities usually classified as "amenities."[6] However, they

* A.B. Princeton University, 1954; LL.B. Harvard University, 1959. Member of the District of Columbia Bar. Former director of the new community assistance programs at the United States Department of Housing and Urban Development, 1970-72. The author acknowledges the assistance of the New Community Development Foundation, Inc. rendered under a grant from the Ford Foundation.

1. A new community for purposes of this Article is a settlement developed on land held in single ownership at a scale permitting (a) the full range of community uses of land, (b) a diverse employment base, and (c) a balance in type, tenancy, and cost of dwellings.

2. *See generally* ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH (1968); D. CANTY, THE NEW CITY (1969).

3. *See, e.g.*, Nicoson, *Community Structure for National Growth*, 2 BUREAUCRAT 45, 50 (1973).

4. For a compendium of articles see references in NEW TOWNS AND DEVELOPMENT: A WORLD-WIDE BIBLIOGRAPHY 72-77 (G. Golany ed. 1973); with regard to residential mix see Gans, *The Possibilities of Class and Racial Integration in American New Towns: A Policy-Oriented Analysis*, in NEW TOWNS: WHY—AND FOR WHOM? (1973); with regard to schools see Lieberman, *Education in New Cities*, 53 PHI DELTA KAPPAN 407 (1972); with regard to health see Herman Joroff, *Planning Health Services for New Towns*, 57 AM. J. OF PUB. HEALTH 633 (1967); with regard to planning for women see Temple, *Planning and the Married Women with Children—A New Town Perspective*, in AMERICAN SOCIETY OF PLANNING OFFICIALS REP. No. 301, PLANNING, WOMEN & CHANGE 43 (1974).

5. *See, e.g.*, M. APGAR, INTRODUCTION TO NEW PERSPECTIVES ON COMMUNITY DEVELOPMENT (to be published in Dec. 1975).

6. Amenities are developed features of a community which add recreational, aesthetic,

may also serve as alternative vehicles for the development of more traditional public services and facilities.

This Article will survey several modes of financing the development of new communities. It will examine the relationship between private developers and state and local governments in this development process, and it will also consider the federal government's role in stabilizing the development process of new communities.

II. Financing the Land Development Process

A. Public and Private Partners

Development of new communities inevitably brings together numerous public and private de facto financial partners: builders and developers, municipal governments, county governments, school and other special districts, departments of state governments, and various federal agencies. The financial responsibilities of each participant, however, are rarely reduced to the tidy compartments of a partnership agreement. They only can be discerned in a fragmented pattern through land sales contracts, deed covenants, subdivision regulations, zoning approvals, sewer permits, capital improvement budgets, utility contracts, and federal agreements for grants-in-aid or credit assistance. Frequently participants perceive themselves as antagonists, rather than as partners, due to the absence of a clear allocation of financial responsibilities at the outset.

Private developers are the prime movers. They select sites based on preliminary studies; negotiate control over adequate acreage; undertake market studies, physical planning, social planning, and financial analysis; arrange permanent financing; secure zoning and other approvals of local government; undertake commitments related to schools, health facilities, utilities, roads, parks, recreation facilities, community buildings, and public safety; negotiate with builders, churches, and industry on land sales; undertake key construction; negotiate with prospective residential, commercial, and industrial tenants; and manage the development process.[7] They must also balance disbursements and revenues throughout the development period,[8] and, if successful, they should make substantial

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cultural, or other environmental value.

7. *See generally* J. McKEEVER, THE COMMUNITY BUILDERS HANDBOOK (1968).

8. *See generally* Spear, *Economic Modeling for New Town Evaluation*, in 1 NEW COM-

profits at the end of the development period through appreciated land values resulting from urbanization. The risks, however, are great. The surplus of revenues over disbursements may be upset by unforeseen marketing problems or other factors over the long development period. In the early years, revenues will be slight and development costs high as basic infrastructure is being installed in the new community in preparation for land sales.[9]

Many new community developers have attempted to ease this front-end cash drain by selling retail lots in advance of servicing. This practice, however, destroys developers' ability to adjust plans while fostering fragmented building patterns over the development period. The only alternative is heavy front-end capitalization. Under this method, debt proceeds are initially relied upon to cover high development costs, while in later years operating revenues must cover debt service and future improvements.

In an ideal world, the private developer would accept responsibility for the development of land for private use (residential, commercial, industrial, etc.) and government would accept responsibility for development of land for public use (schools, clinics, parks, recreation and community facilities, etc.).

With respect to the construction of public facilities, financing is normally undertaken by local governments in the tax-exempt market where interest rates ordinarily are substantially lower than interest rates in the mortgage or corporate bond markets, and repayment can be related to the long useful life of the facilities involved. In the case of infrastructure for a new community, the problem facing local government is whether increased tax revenues will balance the sum of (1) capital costs of the infrastructure, (2) interest

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MUNITY DEVELOPMENT, PLANNING PROCESS, IMPLEMENTATION AND EMERGING SOCIAL CONCERNS 1 (1970).

9. New community development requires patient capital: debt with repayment of principal scheduled over a term which conforms to cash flow projections (often ten to twenty years) and equity for which any return may be postponed over at least the same period. Mortgage financing severely limits the flexibility of the land developer, since the term of indebtedness is tied to the ownership of designated real estate. Payment of principal is required to clear land for sale.

Unsecured debt financing for land development is very expensive due to the risks involved and such financing has not generally been available for a term longer than five years. The federal program of guarantee assistance for qualifying new communities (now suspended) was designed to meet this problem by assuring the availability of long-term financing at reasonable interest rates. *See* text accompanying notes 60-64 *supra*.

payments, and (3) operating costs for the facilities and services.

Since local real estate tax laws generally assign higher rates to industrial land use than residential land use, the fiscal impact of a new community having both industrial and residential land will be more positive than that of a collection of residential subdivisions of comparable population.[10] On the other hand, local officials may be skeptical of a developer's ability to attract industry, or they may fear the environmental consequences of a developer's success.[11] In addition, the borrowing power of many urbanizing jurisdictions may be depleted by the fiscal drain of unbalanced growth over prior years.

The process of coming to terms with local government on zoning and other approvals is frequently a process of negotiating how much of the cost of development for public use can be shifted from local government to the developer or to another governmental participant. In the end, of course, the citizen pays. But a shift of financial responsibility for public development among participants should minimize the individual burdens of citizen-taxpayers.

Costs of development for public use borne by the private developer will be reflected in the price of land developed for private use. The same costs will be reflected in the price of the homes built on such land. From the viewpoint of local government, ultimate responsibility for these costs will lie with residents of the new community. Existing residents of the taxing jurisdiction, however, will escape responsibility.

The costs of financing public facilities will almost always be higher if borne successively by developer, builder, and home buyer (ultimately by the citizen as mortgagor) than if borne by local government at tax-exempt interest rates (and ultimately by the citizen as taxpayer). Or more precisely, that portion of cost represented by the difference between taxable and tax-exempt rates will be spread among the total tax-paying population of the United States as an indirect federal subsidy. An even larger indirect federal subsidy results from the deductible nature of local taxes, unlike principal repayments on home mortgages.

Of course the same effect occurs where the shift of financial responsibility is made from local government to a federal program of

10. *See, e.g.*, REAL ESTATE RESEARCH CORP., THE COSTS OF SPRAWL (1974).

11. *See* Nicoson, *supra* note 3, at 51-52.

grants or revenue sharing. If the shift is made to state government, the ultimate fiscal burden shifts to taxpayers within the state.

B. Amenities in Search of a Developer

Much of the special character of a new community is determined by well-located, landscaped, open space with ample recreational and cultural facilities which provide cohesion and identity to the community.[12] Development of land for community use typically involves major capital expenditures well beyond the resources or inclination of local government. If a developer passes these costs for public use on to the price of land for private use, the project may lose its competitive edge in the market. If, on the other hand, the developer absorbs these costs, the project may not only lose its profitability but also its feasibility in terms of cash requirements. Faced with this dilemma, most community developers have sought a form of compromise. In some instances, the price of land for private use has been adjusted to reflect some of the costs of public amenities benefiting such land, and profits have been shaved by absorption of some of the costs. The greatest compromise, however, has traditionally been in the range and quality of amenities offered.

Private developers' search for alternative modes of financing capital costs of amenities, outside the selling price of land, has focused upon the creation of independent entities to develop land for community use. Frequently referred to as the "dual developer concept," the variations of this solution involve a tripartite undertaking: the establishment between the private developer and local government of a third partner known as the secondary developer. This new entity is responsible for the development of land for community use. In an ideal world, these functions would properly be executed by local government. But, since new community standards ordinarily represent a substantial improvement over prevailing local standards, the limited resources and expertise of local government require another participant to assume this responsibility.

The use of specially created entities for development of community amenities offers two major advantages to private developers. First, it permits capital financing through future assessments

12. *See, e.g.*, L. HAWORTH, THE GOOD CITY 39-52 (1963); L. MUMFORD, THE URBAN PROSPECT 56-78 (1968); Bogard, *The Role of Large Scale Enterprise in the Creation of Better Environment*, in ENVIRONMENT FOR MAN 269-73 (W. Ewald ed. 1967).

rather than a front-end pass-through in the selling price of land.[13] Second, it offers the possibility of divorcing the financing of amenities from the cash requirements of the primary developer.[14]

Both of these advantages simultaneously convey benefits to community residents. Secondary developers may be structured to give residents a major, and eventually controlling, voice in the planning and development of land for community use. Moreover, long after primary developers have departed, having sold the last acre for private use, secondary developers will remain as community organizations which administer, maintain, and expand common lands and facilities with independent financial resources.[15]

A potential disadvantage facing primary developers, in entrusting development of amenities to secondary developers, is the loss of control over the quality of open space and recreational land. This quality is crucial to land sales for private use, particularly residential use. Primary developers may feel that the efficiency, timing, and coordination of land development for community use must remain within their control.

The nature of a solution to this problem usually depends upon the private or public character of secondary developers. If secondary developers are private non-profit associations, primary developers holding a controlling share of land within the community and assuring the borrowing capacity of secondary developers should be able to exercise control over their activities. On the other hand, it would be inappropriate for private developers to control the activities of public agencies or authorities which act as secondary developers, at least to the extent that these agencies serve an exisiting population. The use of taxing powers, for example, would appear to be inconsistent with domination by any private interests. The establishment of contractual standards enforceable by the primary developer is therefore the best solution in the case of a public secondary developer.

It is important to recognize that resident control is often undesir-

13. This advantage may expand the scope of housing markets defined by price range.

14. The period of amortization for capital costs of amenities may extend well beyond the period of land development for private uses. This financing technique is wholly consistent with the public nature of the development product.

15. The credit of the secondary developer at the outset must usually be supplied or assisted by the primary developer; but over time, if the assessments are secured by a primary lien on project property, the secondary developer may achieve financial independence.

able since such control is not always synonymous with the broader public interest. If, for example, a majority of early residents sought to impose high charges for the use of community facilities or to adopt other measures designed to exclude or discriminate against low-income residents in contravention of the developer's announced plans and objectives, there is a clear national interest in preventing such exclusion or discrimination, despite prevailing views of the local constituency. Contrary to the home builder stereotype, land developers serve their own interests by penetrating the full range of residential markets defined by price range. Profitability increases directly with the rate of sale, and the rate increases in large scale projects with the range of markets penetrated. Thus developers' interests may on occasion be more closely aligned with national objectives in the urbanization process than the parochial views of a local resident majority.

Two principal variations of the dual developer concept—a private non-profit association and a special public authority—are best illustrated by the prototypes currently in operation at Columbia, Maryland and Newfields, Ohio. Succeeding sections of this Article will examine each of these prototypes and review other proposed solutions involving government intervention by general purpose jurisdictions. It will conclude with an analysis of federal policy toward both the dual developer concept and government intervention in the development process.

III. The Private Solution

A. The Columbia Association

The plan for Columbia, Maryland[16] included a range of physical and social amenities which have no precedent in Howard County, Maryland.[17] The construction costs of physical improvements for these purposes are expected to exceed $23 million, and gross operat-

16. Information on the Columbia Association has been supplied through interviews with its counsel, John M. Jones, Esq., in Washington, D.C., May 6, 1971 and January 3, 1974. For a detailed description of the Columbia Association see R. Brooks, New Towns and Communal Values: A Case Study of Columbia, Maryland (1974).

17. These amenities include five lakes, three to five 18-hole golf courses; over 3,000 acres of open space with related walkways, bicycle paths and bridle paths; swimming pools, tennis courts, and baseball diamonds in each neighborhood; service facilities such as child care centers, adult educational programs, art classes, remedial education programs; and physical facilities for these services and for meetings and indoor recreation.

ing expenses for these facilities and services are projected at $44 million during the first fifteen years.[18]

The Columbia Association was created to develop amenities; it is a non-profit membership corporation in which the directors are the sole members. Through classification of directors and staggering of their terms, the primary developer is assured control of the association through an advanced stage of completion of the new community. Initially, Columbia residents are given the right to select one director for each 4,000 dwelling units. By 1981 the association's residents will be the sole electors of representatives. The developer's representatives on the board, initially seven, decline on a fixed schedule between 1976 and 1980.

All property sold within Columbia, excluding non-taxable property and one large industrial tract, is subject to covenants running with the land which obligate owners to pay annual charges to the association at a rate of no more than 75 cents per $100 of assessed valuation. This assessment is secured by a lien superior to all other liens except those for taxes, purchase money mortgages from original sellers, and any other public charges which are authorized by law to be superior. Mortgagees have provided for placing these assessments into escrow in the same manner as taxes.[19] These assessments should be of less concern than taxes to a mortgagee since the limit of an assessment, as a proportion of the value of the underlying land, has been permanently fixed.

The Columbia Association represents a creative application of public financing techniques by the private sector. Through the association, the developer has protected the selling price of the land from the effects of amenity costs, thus making Columbia more competitive in the market and more adaptable to a diversified housing mix. It has also established a basis for amortizing the capital cost of amenities well beyond the development period; and the developer can project that after some ten years of development the financing of amenities will be totally independent of its own financial re-

18. Letter from John M. Jones, Esq., counsel for the Columbia Association to William Nicoson, Esq., May 6, 1971.

19. The placing of assessments into escrow also assures potential home buyers of disclosure under Regulation Z, 12 C.F.R. §§ 226.1-.1002 (1975), promulgated under the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1975). The Association has recently adopted measures to improve the dissemination of information about the assessment.

sources.[20] Moreover, the secondary developer constitutes a viable mechanism through which community residents may realize community objectives after the close of the development period. During the development period, community residents possess a greater voice in the planning of the community than if the private developer alone was responsible for the entire development process.

B. The Transfer of Power

Several factors must be considered in controlling the timing of the transfer of power to residents.[21] If multiple public facilities and services are involved, it may be desirable that the timing of resident control vary on a functional basis.[22] Control over the facilities and services which are essential to the realization of the development plan's objectives should only pass after the facilities or services are substantially in place. These factors have prompted some developers to plan a series of non-profit associations or foundations which would individually assume operational responsibility for facilities and services that are defined by their function.[23]

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20. Initially, the Association was totally dependent upon the developer for necessary credit, borrowing $15 million in 1965 at an interest rate which equalled the average rate paid by the developer to its lenders. In 1968 some of these lenders purchased $5 million of this indebtedness. In January 1973, the entire $15 million was refinanced on a 30-year basis by placement with nine financial institutions at an interest rate of 7.875 percent. These bonds received an A rating from Moody's Investors Service, the same rating accorded to general obligations of Howard County. Simultaneously an additional $7.5 million in three-year subordinated notes were issued by the Association bearing the developer's guarantee. It is anticipated that by the end of 1976, the Association will be in a position to refinance this $7.5 million on a long-term basis and wholly independent of the developer's credit. Additional independent borrowings are projected through 1980 with total repayment projected in 2008. By 1987 the Association projects an assessment base of $1.6 billion, yielding $12 million annually (in 1973 dollars). H. MIELDS, FEDERALLY ASSISTED NEW COMMUNITIES 243 (1973). Projections have been updated by the Columbia Association.

21. The Columbia Association expects that control of its Board will pass to residents sometime in 1976. It is apparently a coincidence that in the same year the Association will attain total financial independence from the developer. Other new communities following the Columbia pattern should consider linking these two events in the formula by which directors are selected.

22. *See* Clark & Mode, *The Transfer of Power in New Communities*, in 2 NEW COMMUNITY DEVELOPMENT: PLANNING PROCESS, IMPLEMENTATION AND EMERGING SOCIAL CONCERNS 1 (1971). Completion of large scale recreational facilities, for example, may require a longer period than day care facilities. Open space oriented to neighborhood rather than community use might well be turned over to neighborhood control as the neighborhood comes into existence.

23. Still another community association may be established for purposes of channeling private foundation support into the various facilities and services being undertaken. At River-

Many new communities have also established a hierarchy of resident associations exercising control over open space at the neighborhood or village level as well as at the community level. A cluster association of this kind generally exercises no development functions; rather, it takes title to common lands related to the cluster for the benefit of its members, usually property owners within the cluster, and undertakes maintenance of these common lands. The use of such associations permits control of open space to pass to residents at an early stage and fosters neighborhood identity and cohesion.

The resident association structure planned for Gananda, New York,[24] illustrates both the functional and geographic determinants of timing in the transfer of control, although there is now serious doubt whether these innovations will be tested due to economic difficulties facing the project.[25] Two associations have been plannned: (1) the Facilities Corporation has responsibility for ownership and maintenance of facilities; and (2) the Community Association has responsibility for operation of programs. The Facilities Corporation is to be property oriented; the Community Association is to be program oriented. Control of the Community Association passes to residents at an earlier stage than control of the Facilities Corporation.[26]

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ton, New York, for example, foundation funding for child care has been obtained, and with some initial support from the developer, it is hoped that this service can be placed on a self-supporting basis. To the extent that such arrangements are economically feasible, the Riverton plan avoids a charge against the general population for services used by a limited segment of the population. It also offers a mechanism to achieve immediate user control upon completion of single-function facilities.

24. Details concerning the Gananda Facilities Corporation and Gananda Community Association are drawn from Gananda Development Corp., Community Governance in Gananda (1974) (an unpublished report submitted to the Department of Housing and Urban Development).

25. Like most other large land development projects begun in the early 1970's, Gananda has encountered severe inflation on the cost side and, on the revenue side, a precipitous decline in demand for new housing or housing sites. Builders have been out of the land market since they have not been able to finance new construction and since consumers have not been buying. Large-scale land developers thus find themselves at peak debt with all disposable funds invested at constantly inflating prices in land and land improvements but without a market for improved land. Gananda has also suffered from multiple changes of top management. The developer is currently engaged in negotiations with its lenders and with HUD in an attempt to refinance the project. The failure of these negotiations would kill the project in its proposed form, including proposed institutional innovations.

26. A neighborhood board of the Community Association has control over all non-school

Financing for the operation of the facilities and programs is provided by an assessment levied by the Facilities Corporation and shared by formula with the Community Association.[27] Capital costs of amenities at Gananda are generally financed by the private developer in the price of land sold for private use.

C. The Distribution of Power

An even more difficult question than the transfer of power from private developers to residents is the identification of the residents who should share in that power. Should voting rights be exercised on a one-man, one-vote basis by all residents: landowners, tenants, and mature dependents alike? Should a one-unit, one-vote rule prevail? Should large landowners be entitled to additional votes based on acreage? There is no single answer since voting rights should depend upon the purposes and functions of the particular association. When an association undertakes broad and varied operational functions for a community of a nature which has generally been exercised by local government, there is a strong presumption in favor of one-man, one-vote.[28] On the other hand, where the functions have been limited to maintenance of common lands closely tied to private residential units, the rule of one-unit, one-vote is reasonable.[29] The ultimate question, however, is the role to be played by the tenants.

Tenant exclusion from cluster associations is unsatisfactory because it fails to recognize the legitimate interest of tenants in cluster

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programming for each neighborhood. During neighborhood development, resident-elected board members replace developer-appointed members, and elected members gain control when approximately one-third of the neighborhood dwelling units are either sold or leased. The community-wide board of the Association passes to resident control when the second neighborhood board passes to resident control. Control of the Facilities Corporation remains with the developer until the project is approximately 85 per cent completed.

27. User fees are expected to be insignificant in revenue generation in comparison to the assessments. Low user fees should encourage participation in Community activities.

28. *Cf.* Avery v. Midland County, 390 U.S. 474, 484-85 (1968) where the Court said: "[T]he Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."

29. In the Gananda Plan, the Community Association will follow the rule of one-man, one-vote, while the Facilities Corporation will follow the rule of one-unit, one-vote, with the vote of rental units split ¼ to the landlord, ¾ to the tenant. Commercial and industrial establishments will be represented on the Board of the Facilities Corporation but will never control the Board.

activities. Delegation from owner to tenant of full voting power is also unsatisfactory because of the owner's long-term interest in cluster activities. Even assumption by tenants of all assessment increases during their respective tenancies does not appear to be reasonable consideration for the issuance of irrevocable proxies by owners during the term of lease. One basis for compromise would be the issuance of irrevocable proxies for all matters, except budget and assessment votes, which would require the owners' concurrence.

Where associations assume development functions, rather than operational functions, voting rights may legitimately reflect developers' interests in assuring adherence to development plans. The best solution is to recognize explicitly the issue of developer control through a classified board with a phased replacement of developer-nominated members by resident-elected members on a formula basis, taking account of both development progress and degree of financial independence of the association. The solution of extra votes for large holdings of undeveloped land, aside from risking a transfer of power at an inappropriate time,[30] is a pointless circumvention with the obvious purpose of maintaining developer control.

If an association exercising development functions succeeds to varied operational functions, consideration should be given to appropriate conversion from one pattern of voting rights to another. Due to overlapping functions during a long development period, the creation of two sub-associations sharing a common financial structure may be desirable. One sub-association would manage development functions, while the other manages operational functions.

IV. The Public Solution

A. Newfields' New Community Authority

Since the dual developer concept relies upon public financing techniques in developing land for public use, it is logical that the next step in the evolution of this concept has been the creation of a public agency rather than a private association to act as the secondary developer.

The Ohio legislature in 1972 authorized the establishment of new

30. The timing in transfer of power should be related to occupied units rather than the developer's holdings of undeveloped land, which, due to advance purchases by builders or other land inventory changes motivated by market conditions, may not reflect the true status of development progress.

community authorities to finance, develop, and administer physical and social amenities in new communities meeting the standards of the federal new communities program.[31] Under this legislation, a New Community Authority was created in 1973 to participate in the development of Newfields, Ohio.[32] The Authority's activities are similar to those of the Columbia Association, except that the Authority has the additional statutory power to provide water supply, sewage treatment, and waste disposal if these services cannot be provided by local government.[33]

The authority's board of trustees will initially consist of three to six "citizen" members appointed by the county commissioners; an equal number of "developer" members appointed by the private developer; and one "local government" member, appointed by the county commissioners. All appointed trustees will eventually be replaced over the development period by elected trustees, although the transition will occur at different rates for each category.[34] At no time, however, will trustees named by the developer constitute a majority of the board.

While there appears to be no public policy objection to private developers' nominations of board members from their own employees, the Newfields' private developer was advised by counsel that, under the Ohio ethics statute,[35] none of the trustees of the authority could receive compensation from the developer. If the Newfields pattern is followed in other states, it may be desirable to override any similiar proscription by authorizing employees of private developers to serve as developer-named trustees.

Like the Columbia Association, the authority's financial plan is predicated upon an income assessment imposed by covenants running with the land rather than upon the power to levy taxes.[36] This

31. OHIO REV. CODE ANN. §§ 349.01-.16 (Page Supp. 1975).

32. Information on the Newfields New Community Authority is based upon interviews with Reuben Clark, Esq., Counsel for the Donald L. Huber Development Group, in Washington, D.C., Jan. 3, 1974.

33. The Authority also has power to lease schools, classrooms, and other educational facilities to local school districts, and may thus construct multi-functional buildings to be used for various educational, cultural, and civic purposes.

34. *See* OHIO REV. CODE ANN. § 349.04 (Page Supp. 1975).

35. *Id.* § 102.04(B).

36. *See id.* § 349.07. Covenants filed by the Newfields developer authorize an assessment of one percent of residents' income from wages, salaries, and commissions, subject to increase to three percent on the approval of seventy percent of the residents. The assessment will be

provision permits the developer to control both the type and the maximum rate of assessment imposed for the benefit of the Authority. The assessment based upon income rather than the assessed value of residential land is a constructive innovation since the community will share directly in the value of the expanding income dollar; moreover, low income families will only pay an amount that is directly proportional to their earnings. Other new communities following the Newfields pattern may wish to adopt an even more progressive assessment by scaling the rate of the assessment according to income brackets of the respective residents.

It is expected that residents will be required to file annual income statements with the Authority as well as estimated statements for the coming year. Based upon estimates, mortgagees and landlords will collect and place into escrow increments of the assessment. Residents holding land subject to neither mortgages nor leases will be required to make regular payments of estimated increments of the assessment directly to the Authority. At the time of filing the statements of actual income, supplementary payments or credits will be required to adjust estimated payments to the amount of the actual assessment.

The principal financial value of a public authority as secondary developer is based upon the tax treatment accorded public agencies. The income of private non-profit associations engaged in community activities may, like public agencies, be exempt from federal income taxation.[37] However, private associations do not ordinarily offer their bondholders federal income tax exemptions for interest paid by the associations;[38] likewise residents would not be entitled to federal income tax deductions for assessments paid to these associations.[39]

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collected in addition to the one percent income tax payable by Newfields residents who work in neighboring jurisdictions. Industrial and commercial land in Newfields will be subject to an assessment based on real property value at a rate no greater than five mills. It is expected that this assessment will be collected on behalf of the Authority by county revenue agents.

37. An exemption may, however, be unavailable where the association's activities are directed toward the exterior maintenance of private residences. *See* Rev. Rul. 74-99, 1974 INT. REV. BULL. No. 9, at 11-12.

38. *Compare* INT. REV. CODE OF 1954, § 61(a)(4) *with id.* § 103(a).

39. These assessments are, in effect, nondeductible charges for personal services. If, however, an identifiable portion of an assessment is allocated to a service the cost of which is properly deductible, such as child care expense for working parents under section 214 of the Internal Revenue Code, this portion should be deductible. *Id.* § 214.

It is possible, however, that the Internal Revenue Service may rule that a private association engaged in public development in a new community has the power to issue tax-exempt obligations. This conclusion has been reached for a non-profit corporation formed to stimulate local industrial development.[40] This ruling specified five conditions,[41] all of which could be met by a non-profit developer of amenities, except the requirement that a unit of government take title to the property financed by the tax-exempt obligations upon their retirement.[42] Inventive counsel for a community association might be able to find a substitute for this requirement which would satisfy the Internal Revenue Service.

It is doubtful, however, that assessments paid to a private association, rather than a public authority, would be held to be deductible from the federal income tax of residents. Counsel for the Newfields' developer has taken the position that assessments of the Newfields Authority will be deductible by residents even though the assessments are imposed by covenants rather than by ordinance.[43]

Apart from tax benefits available through use of public authorities, the Newfields solution offers community residents a greater voice in development than the Columbia solution. Since Newfields' primary developer cannot exercise control over the authority's board of trustees, it must rely upon contracts to assure the desired quality and coordination of the development of amenities. Both primary

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40. Rev. Rul. 63-20, 1963-1 CUM. BULL. 24.

41. *Id.* at 25. The ruling provides:

> The Internal Revenue Service holds that obligations of a nonprofit corporation organized pursuant to the general nonprofit corporation law of a state will be considered issued "on behalf of" the state or a political subdivision thereof for the purposes of section 1.103-1 of the Income Tax Regulations, provided each of the following requirements is met: (1) the corporation must engage in activities which are essentially public in nature; (2) the corporation must be one which is not organized for profit (except to the extent of retiring indebtedness); (3) the corporate income must not inure to any private person; (4) the state or a political subdivision thereof must have a beneficial interest in the corporation while the indebtedness remains outstanding and it must obtain full legal title to the property of the corporation with respect to which the indebtedness was incurred upon the retirement of such indebtedness; and (5) the corporation must have been approved by the state or a political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.

42. *Id.*

43. A ruling has been requested from the Internal Revenue Service, and the request has been pending for more than a year. Interview with Reuben Clark, Esq., Wilmer, Cutler & Pickering, in Washington, D.C., October 15, 1975.

and secondary developers of Newfields are bound to project agreements with the federal government assuring such results. In the absence of federal assistance, contractual undertakings could be exacted at the time of land transfer from the primary to the secondary developer.

B. The Captive District

The use of a special district as secondary developer for community scale development did not originate in Newfields. An early and controversial example was the Estero Municipal Improvement District which was created under a special act of the California legislature in 1960 to undertake development of virtually all public infrastructure and services for Foster City.[44] The grant of powers was so broad that it is more accurate to classify Estero as a "general purpose district" rather than a special district.

The Estero District initially differed from a municipality in one important aspect: property owners, rather than eligible voters, elected the district board and thus controlled district activities. Furthermore, voting was weighted according to assessed value of land excluding improvements. This provision permitted the developer to control the district virtually throughout the entire development period by the simple expedient of assessing land owned by the developer at a higher percentage of market value than land owned by others. In the face of a constitutional challenge, the California legislature amended the original legislation in 1967 by adding voter-elected members by 1971 to the board and assuring their control and the displacement of all landowner-elected members by 1979.[45] The amended statute was upheld by divided decision of the California Supreme Court.[46] Developer-controlled districts are bad public policy whatever their constitutional status. Developers who have benefitted from Estero-type enabling legislation[47] may have provided

44. Estero Municipal Improvement District Act, ch. 82, [1960] Cal. Sess. Laws 459, *as amended,* ch. 567, [1972] Cal. Sess. Laws 972.

45. *Id.*, ch. 1511, §5, [1967] Cal. Sess. Laws 3595, *amending* ch. 82, §28, [1961] Cal. Sess. Laws 461 (Extraordinary Sess. 1960).

46. Cooper v. Leslie Salt Co., 70 Cal. 2d 627, 451 P.2d 406, 75 Cal. Rptr. 766, *cert. denied,* 396 U.S. 821 (1969). For a recent unconvincing defense of the Estero-type district, see Comment, *New Community Development Districts: A Proposal to Aid New Town,* 9 HOUSTON L. REV. 1032 (1972).

47. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 11-771 to -771.45 (Supp. 1974); FLA. STAT. ANN. §§ 163.03-.572 (1972), *as amended,* (Supp. 1975).

enlightened municipal leadership, but the exercise of governmental powers by and for a private company, over an extended period of years, is wholly alien to our economic and political system. The Newfields solution, on the other hand, is a major innovation simply because it harnesses public powers for public purposes without imposing private control at any time during the development process.

C. The Compromise District

Many states[48] have enabling legislation for special utility or improvement districts which may be adequate, or may be made adequate with minor amendments, for new community development. A prime example is the 1971 legislation in Texas authorizing the establishment of Municipal Utility Districts (MUD).[49] While not initially intended as a means to assist development of new communities, MUDs have been used in several new Texas communities as secondary developers.

MUD legislation was primarily designed to streamline procedures for the creation and operation of water districts in Texas. In the process of clarifying district powers, however, the legislature explicitly provided for the development and maintenance of recreational facilities in addition to water, sewer, and drainage improvements.[50] To be fully responsive to new community needs, further amendments would be required to authorize such other district services as day care, adult education, and civic activities.

Water districts in Texas, including MUDs, are formed upon petition of a majority of landowners holding land with assessed valuation in excess of 50% of total valuation within the boundaries of the district. The petitioning landowners name an initial five-man board of directors. A majority vote of resident landowners is held to confirm creation of the district and, on the next succeeding January, two of the five directors must stand for election by resident voters. On the following January, the remaining three directors stand for election by resident voters. All directors serve two-year terms.

48. *See, e.g.*, COLO. REV. STAT. ANN. §§ 32-4-101, -9-101, 35-3-108 (1963); ILL. ANN. STAT. ch. 111 2/3, §§ 188-222.1 (Smith-Hurd 1966), *as amended*, (Smith-Hurd Supp. 1975); N.Y. GEN. MUNIC. LAW § 120(t) (McKinney 1975).

49. TEX. WATER CODE ANN. § 54.012 (1972).

50. *Id.* A court test of the validity of MUD use for recreational development under the Texas constitution is anticipated. Interview with Alan H. Raynor, Esq., Fulbright & Jaworski, in Houston, Texas, October 1, 1975.

Under these provisions a MUD acting as a secondary developer of a new community will remain under the control of the primary developer for a period of from one to two years after its formation, or longer in the absence of eligible voters.[51]

New community developers may create a series of MUDs, each corresponding to a development stage, and tied by contract to a single development plan under a master MUD. This technique has been pioneered by Kingwood, a new community near Houston, to assure maximum coordination of public development of water-related systems with development of land for private uses.

The Newfields solution offers advantages not enjoyed by MUDs; the district is designed specifically for new community needs, and the difficult issue of interim developer control does not arise. The Newfields solution has yet to be proven, however, over the long years of total reliance upon contractual rights. Even if convinced that captive districts are counter-productive due to resident dissatisfaction, many private developers may persist in seeking intermediate solutions, such as MUDs based upon the Kingwood pattern, until the Newfields experiment has demonstrated the viability of "liberated" districts bound only by contract.

V. General Purpose Government

If the creation of yet another special district is regarded as an innovation for new communities, it might be concluded that the state of the art is primitive indeed. Such a conclusion suggests that it is time to reexamine the assumption that general purpose local government cannot provide the financing for capital costs of amenities in new communities.

The reluctance of local government to assume this financial burden in the context of suburban or inner city projects is understandable whenever the existing general purpose jurisdiction includes substantial developed acreage outside the boundaries of the new community. Existing residents have not benefited from the high standards of new community development, and they are unlikely to

51. At least when applied to unpopulated areas, the terms of the Texas statute represent a reasonable compromise of competing public interests in the control of district activities. Until a meaningful population base exists, it may be argued that districts must function "as oligarchies that transform themselves, cocoon fashion, into democratic governments as they mature." Mitchell, *The Use of Special Districts in Financing and Facilitating Urban Growth*, 5 URBAN LAW. 185, 212 (1973).

welcome increased fiscal responsibilities in order to assure that future residents of the new community will enjoy such benefits.

The implementation of tax increment financing may successfully overcome this opposition of existing residents. Tax increment financing involves the issuance of local government bonds that are repayable only from the increment of increased real estate taxes generated from development financed by the bonds. If a local government issues special purpose bonds to finance specified amenities in a new community, and if the source of the debt service is limited to the increment of increased local revenue generated by the new community, it is difficult to imagine opposition based upon any increased fiscal burden for existing residents. The availability of tax increment financing depends upon state constitutional and statutory provisions which may be beyond the control of local government.[52] Even in jurisdictions permitting tax increment financing, a requirement for referendum approval of all bond issuances by general purpose local governments may render such financing highly uncertain. The only remedy may be a state constitutional amendment which exempts all issues of special purpose bonds from the general referendum requirement whenever the source of debt service is limited to the increment of increased local revenue generated by the development financed through the exempt issuance of bonds.

In the absence of tax increment financing, a number of suburban new community developers[53] are currently working within incorporated jurisdictions with small preexisting populations. The City of Chaska, a suburb of Minneapolis with a population of 2,500 in 1970, is the site of a new community, Jonathan, which is expected to have a population of 50,000 by 1985.[54] Over $2 million of municipal bonds have been issued already by Chaska to finance public facilities for Jonathan, and substantially greater municipal financing is projected for the future. Chaska has required, however, that the private

52. *See* Jacobs, Community Development and Tax Increment Financing (1973) (unpublished study for Housing Task Force—Team IV, Department of Housing and Urban Development).

53. Among these developers are those working in Jonathan, Minnesota; Park Forest South, Illinois; and Flower Mound, Texas.

54. Chaska will also derive substantial benefits from the development of Jonathan, including a stable tax base, achievement of its comprehensive plan, improved public facilities, orderly administrative growth, a major voice in development decisions and federal new community funds. Einsweiler & Smith, *New Town Locates in a Municipality*, PLANNERS NOTEBOOK, June-July, 1971, at 1.

developer assume the cost of debt service of these bonds as well as a small fee for related municipal administration. In addition, the private developer has assumed liability for all related special assessments against Chaska residents outside of Jonathan who do not wish to use Jonathan's facilities.

Arrangements of this kind are undoubtedly far more difficult where the existing municipality has a substantial suburban population subject to a variety of political pressures arising from poor quality urbanization. Unfortunately, such characteristics often describe suburbia. Where politically feasible, however, these arrangements offer both advantages and disadvantages to the developer. The private developer of Jonathan benefits from tax-exempt rates of an established municipality to the extent that Chaska is willing to make its bonding capacity available. At the outset, these financing arrangements may result in a lower cost of capital than that available to the Columbia Association (issuing taxable bonds) or the Newfields Authority (having no established credit rating). The disadvantage, however, is that private developers retain sole liability for principal and interest payments with little likelihood that future financing by Chaska can be divorced from the developer's own cash flow requirements. By contrast, the Columbia Association is expected to achieve full financial independence and, if Newfields' progress is satisfactory, the Newfields Authority will undoubtedly achieve the same independence.

VI. Federal Policy

A. Guarantee Assistance for Land Development

While the problems of urban growth are clearly among the most pressing issues facing state and local government, federal policy has remained obscure, contradictory, and unreliable with regard to both the dual developer concept and support for state and local intervention in the development of new communities. Administration support for the development of new communities vanished when the Department of Housing and Urban Development (HUD) announced on January 14, 1975 that the processing of new applications for assistance under Title VII of the Housing and Urban Development Act of 1970[55] had been suspended.[56]

55. Title VII of the Housing and Urban Development Act of 1970 authorized nine programs of guarantee, loan and grant assistance to developers of new communities meeting

HUD's principal form of assistance for land development in new communities was its program of guarantee assistance, a governmental underwriting of the obligations of the assisted debtor, for developers whose projects met strict federal standards of eligibility.[57] The approval of the Newfields project for new community guarantee assistance by HUD apparently signaled federal acceptance of the dual developer concept.[58] Although guarantee assistance has only been extended to primary developers, there is no apparent statutory reason why guarantee assistance may not be extended to secondary developers as well. The significance of federal policy under the guarantee program, however, has been undercut by HUD's suspension of processing applications for new projects.

B. Housing Insurance

Federal policy supporting the dual developer concept had been undermined prior to HUD's action by the policies of the Federal Housing Administration (FHA). In the case of the Columbia Association, the FHA accepted both the association's plan for financing amenities through annual assessments and the priority of the association's lien securing assessments.[59] In 1973, however, the

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strict federal standards and to local jurisdictions in which approved new communities were located. 42 U.S.C. §§ 4501-32 (1970).

56. Department of Housing and Urban Development, Newsrelease, No. 75-11, Jan. 14, 1975. This newsrelease also stated that many of the fourteen HUD approved projects were experiencing "severe financial difficulties" and that a HUD evaluation of the new community programs would be completed in February, 1975. *See also* HUD, EVALUATION OF THE NEW COMMUNITIES PROGRAM (1975). This report summarizes public policy arguments for and against new community assistance programs, but does not purport to justify HUD's termination of the application process for guarantee assistance. The report was released without comment or endorsement by HUD's Secretary. Consequently, there has never been an official HUD explanation for termination of the new community programs.

57. 42 U.S.C. §§ 4501-32 (1970).

58. This policy was foreshadowed in a 1971 ruling on the potential eligibility of the Columbia Association for federal new community assistance which the association did not pursue. The ruling stated that such assistance would be made available to secondary developers, such as the association, on the following conditions:

> (a) Both the primary and secondary developers must be eligible for assistance and must be contractually bound to comply with program requirements.
>
> (b) Assistance to a secondary developer must not be used to circumvent requirements as to equity or security.

Letter from the Director, Office of New Communities Development (HUD) to John M. Jones, Jr., Esq., Aug. 27, 1971.

59. Letter from General Counsel of the Federal Housing Administration to John M. Jones, Jr., Esq., June 6, 1967.

FHA refused to apply the same policy to the HUD-approved new community of Riverton, New York.[60] The Secretary of HUD overruled the FHA on the use of assessment financing yet he apparently sustained the FHA's refusal to approve a prior lien securing assessments.[61] Only in the case of the Newfields Authority, a public agency, has the FHA agreed, for a trial period, to recognize a lien for assessments as comparable to a tax lien. Furthermore, since the FHA's action regarding Riverton was limited to an HUD-approved new community, it appears that negative FHA policy on both assessment financing and priority of liens will be applied to projects which have not qualified for new community assistance.

The Riverton ruling is not a serious setback to developers of new communities which benefit from HUD's guarantee assistance. Approval of assessment financing simply means that the capital costs of amenities will not be reflected in land prices. Although failure to approve the priority of assessment liens over FHA insured home mortgages severely diminishes the possibility that secondary developers will achieve financial independence, capital will be available for amenities from the proceeds of federally guaranteed borrowings. The effect of FHA's position is to increase substantially federal guarantee exposure in order to eliminate the negligible risk of assessment liens for insured mortgages.[62]

C. Assistance for Public Development Agencies

Contradictions in federal policy toward the dual developer con-

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60. Letter from the Acting Assistant Secretary for Community Planning and Management, HUD, to Andrew Goldman, President of Riverton Properties, Inc., June 13, 1973.

61. The mortgage insurance programs of FHA are limited by statute to first mortgages, defined as "such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate . . . ." 12 U.S.C. § 1707(a) (1970). First liens are commonly subject to a variety of prior encumbrances, including liens for real estate taxes. The annual assessment of a community association is analagous to such taxes and usually less hazardous to lenders since its upper limits are normally fixed by covenants running with the land. Congress has, furthermore, directly sanctioned such prior liens in the case of Veterans Administration programs subject to the same first mortgage requirements, 38 U.S.C. § 1803(d)(3) (1970). In taking this action, Congress noted that FHA policy at the time (under the Columbia ruling) permitted such prior liens. H.R. REP. No. 242, 91st Cong. 1st Sess. 3 (1969). The legislative history thus supports the view that Congress contemplated priority for liens securing community associations' assessments over the liens of mortgages insured by FHA. *See id.*

62. The community residents lose even more than the federal government under the Riverton ruling. They will not inherit a powerful and financially independent organization to renew and expand community facilities and services after the developer has departed.

cept are compounded by federal policy toward public development agencies. Funds for the Washington, D.C. subway system, for example, have been raised by the local transit authority through the issuance of taxable bonds bearing a federal guarantee. The authority receives a direct federal subsidy as compensation for the loss of tax-exempt interest rates. The same mechanism was authorized by Congress to encourage participation by state and local agencies in new community development—a federal guarantee of taxable bonds with a direct grant to compensate for loss of tax-exempt interest rates.[63]

Yet the Office of Management and Budget has never permitted the interest-differential grant to be funded, thereby effectively eliminating the incentive to encourage public agency participation in new community development. This action is of questionable legality[64] and appears wholly at variance with the publicly announced objectives of the "new federalism."[65]

If the new community guarantee program is ever revived, a means of obviating the administration's distaste for the interest-differential grant may lie in the Federal Financing Bank (FFB).[66] The authorizing legislation of the FFB contains provisions designed to insure that municipal bonds purchased by the FFB will bear interest at rates prevailing in the tax-exempt market.[67] If new community bonds, issued by state or local governments and guaranteed by HUD, are purchased by the FFB, and if the interest rate is fixed in the manner intended by Congress, the FFB would eliminate the need for interest-differential grants envisioned in Title VII of the

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63. 42 U.S.C. §§ 4511-15 (1970).

64. Funding of the interest-differential grant was authorized by Congress from Treasury borrowings or from fees and charges collected in administration of the guarantee assistance program rather than from appropriations. *Id.* § 4518(a), (b). An argument may be made to extend an anti-executive impoundment theory to areas of "back-door" financing where federal appropriations are not required. The net result of impoundment of appropriations and denial of funding from Treasury borrowings or fees and charges is the same. For a discussion of the constitutionality of executive impoundment see Note, *The Case Against Impoundment*, 2 HASTINGS CONSTITUTIONAL L.Q. 277 (1975).

65. For a general discussion of the "new federalism," see AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION, THE ADMINISTRATION OF THE NEW FEDERALISM: OBJECTIVES AND ISSUES (1973); M. REAGAN, THE NEW FEDERALISM (1972). For a summary of developments in economic interaction between states and federal government, see O. STOLZ, REVENUE SHARING: LEGAL AND POLICY ANALYSIS 1-16 (1974).

66. Federal Financing Bank Act of 1973, 12 U.S.C. §§ 2281-96 (Supp. III, 1973).

67. *See id.* § 2294.

Housing and Urban Development Act of 1970.[68] In the absence of precedents indicating the FFB's policy, however, it is impossible to determine if the FFB would fill the vacuum in federal incentives for direct state and local development of land for public uses in new communities.

VII. Conclusion

The land development process creates inevitable tension between the objectives of its two participants: the private developer and local government. Local government usually plans to accomodate growth in rational patterns through the gradual emergence of communities on the periphery of existing urban areas. The communities often do not materialize because the economics of development through multiple small-scale projects dictate the private builder's predilection for uniform, relatively low, residential densities. Public objectives inherent in rational land use cannot be achieved by forcing builders to sacrifice the private objective of return on investment. Development at community scale, however, tends to align private interests in the long-term development process with the public interest.[69]

Under ideal circumstances, collaboration between an enlightened local government and a well-intended community developer will be a painful partnership. In most cases, the level of infrastructure support extended by local government will be inadequate. In a sense, the developer's plans for creation of an urban environment of superior quality serves a higher public interest than the local government is able or willing to serve because of either the level of its existing resources or the attitudes of its existing residents. Under such conditions frustration shifts to the developer. His success may now depend upon his reaction to inadequate public support for the public interest he seeks to serve.

Like local government determined to drive out the developer with no-growth policies, the private developer may overreact by deciding to supplant local government with a new government creature which is subservient to the developer's "higher public interest." Inevitably, however, the new government creature, such as an Estero-type district, will also serve the developer's private interests. It is unwise to permit any private interests to control powers of local

68. 42 U.S.C. §§ 4511-15 (1970).

69. For a detailed analysis see Nicoson, *supra* note 3, at 46-48.

government (such as taxation) to which an existing population is subjected.

It would be better for developers to seek a joint solution with local government which involves the creation of a third partner whose functions are carefully designed to close the gap between the developer's high objectives and the low level of public resources. If developers insist upon voting control over the new partner, a private, nonprofit vehicle, similar to the Columbia solution, should result. If developers insist upon the benefits of public financing, a special new community district, similar to the Newfields solution, should result unless existing state enabling legislation for utility or improvement districts, characteristic of Kingwood, offers a viable alternative.

The best solution, however, is a determination by local government to discharge its responsibilities to future residents of new communities by accepting responsibility for public facilities and services. The use of a tax increment financing may make such a solution palatable for existing residents. Like the special district, tax increment financing limits the impact of new fiscal burdens to the residents benefited thereby but, unlike the special district, it does not fragment local government responsibility.

Use of the developer's credit or the credit of the federal government as purchaser or guarantor of municipal bonds will nevertheless be essential in the early years before a substantial and reliable tax base has been generated to justify market acceptance of the bonds. Of course, a newly created private association or special district faces the same question of market acceptance for its obligations.

Federal assistance is thus a key to effective functioning of the public-private partnership in community scale development. But federal policy has been difficult to discern amidst conflicting rulings, budget pressures, and the unsupported rhetoric of the "new federalism." Until the federal government is willing to make a strong commitment to the development of new communities, haphazard land development patterns will persist in the United States.